Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
The Pay Telephone Reclassification	)	**CC Docket No. 96-128**
and Compensation Provisions of the	)	
Telecommunications Act of 1996	)	
	)	
RBOC/GTE/SNET Payphone	)	**NSD File No. 99-34**
Coalition Petition for Reconsideration	)	

INITIAL COMMENTS OF IDT CORPORATION

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Table of Contents

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Introduction

IDT Corporation ("IDT")[1] submits its Initial Comments in response to the Petitions filed by Worldcom, Inc. ("Worldcom"), AT&T Corp. ("AT&T") and Global Crossing Telecommunications, Inc. ("Global Crossing") (collectively, "Petitioners" or "facilities-based carriers") in this proceeding. As is evident from the Petitions, as well as IDT's response to the to the Petitions contained herein, the Commission's *Second Order on Reconsideration*[2] has established a tracking, reporting and compensation regime for facilities-based toll origination providers and their switch-based reseller ("SBR") customers that is neither clear nor effective.[3] IDT asserts that the Commission needs to revise, not make exceptions for, its rules so that the rules accomplish their intended purpose – "to better ensure that payphone service providers (PSPs) are fairly

[1] IDT is a provider of prepaid calling cards, one of the coinless call services affected by this proceeding. The service provided on its calling cards is through switch-based resold service. IDT receives service from the three service providers that have filed Petitions in this proceeding and is therefore directly affected by the Petitions' outcome.

[2] *Second Order on Reconsideration*, In the Matter of The Pay Telephone Reclassification And Compensation Provisions Of The Telecommunications Act of 1996, CC Docket No. 96-128; RBOC/GTE/SNET Payphone Coalition Petition for Clarification, NSD File No. L-99-34; FCC 01-109 (March 28, 2001)("*Second Order*").

compensated for all completed, coinless calls made from … payphones"[4] and "to verify the accuracy of compensation [PSPs] receive[.]"[5]

IDT's greatest concern is that facilities-based carriers are petitioning to alleviate the burden of their tracking, reporting and compensation obligations by passing the buck, both literally and figuratively, to SBRs such as IDT. Specifically, Worldcom has proposed that the Commission declare that a completed dial-around payphone call be defined as one that is completed on the underlying carrier's network or one that is handed off to SBR customers that do not have prior agreements with all PSPs to pay dial around compensation.[6] AT&T proposes a similar definition, but does not propose an "opt out" provision for SBRs.[7] Global Crossing requests that the Commission implement timing surrogates to determine compensable calls as well as limit the ability of SBRs to negotiate arrangements with PSPs.[8] The practical and immediate effect of granting the Worldcom's and/or AT&T's requests will be to create two tiers of providers in the coinless calling marketplace: SBRs, who will remit per-call compensation as well as tracking costs for calls that are not answered by the called party, and facilities-based providers, such as Worldcom and AT&T, who will avoid these costs and thereby gain a competitive advantage. In order to prevent such harm to SBRs, the Commission must

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[3] *Id.*at ¶ 11.
[4] *Id*. at ¶ 1.
[5] *Id*. at ¶ 11.
[6] "Worldcom, Inc. Petition for Declaratory Ruling and Petition for Reconsideration," In the Matter of The Pay Telephone Reclassification And Compensation Provisions Of The Telecommunications Act of 1996, CC Docket No. 96-128; RBOC/GTE/SNET Payphone Coalition Petition for Clarification, NSD File No. L-99-34 ("Worldcom Petition") at p. 1.
[7] "AT&T Petition for Clarification and/or Reconsideration," In the Matter of The Pay Telephone Reclassification And Compensation Provisions Of The Telecommunications Act of 1996, CC Docket No. 96-128; RBOC/GTE/SNET Payphone Coalition Petition for Clarification, NSD File No. L-99-34 ("AT&T Petition") at p. 1.
[8] "Petition for Reconsideration and Clarification," In the Matter of The Pay Telephone Reclassification And Compensation Provisions Of The Telecommunications Act of 1996, CC Docket No. 96-128;

eliminate, stay, delay, revise or otherwise halt its tracking, reporting and compensating requirements.

The Commission must take such action because interested parties were not provided notice of the Commission's intention to change reporting requirements and therefore were unable to address the flaws inherent in the Commission's rule modifications. Also, the reporting requirements do not support the Commission's goal: to verify and secure compensation for completed coinless calls originating from a payphone. Instead, the reporting requirements create unnecessary and burdensome costs to facilities-based carriers and to SBRs, as demonstrated in the Petitions and IDT's comments provided herein.

Regardless of whether the Commission eliminates, stays, delays, revises or otherwise halts the implementation of its modified reporting requirements, it must deny Worldcom's request to change the definition of a "completed call." Worldcom's proposed change is contrary to the Commission's previous interpretation of 47 USC § 276(b)(1)(A)'s mandate to "ensure that all payphone service providers are fairly compensated for each and every completed intrastate and interstate call using their payphone…." Additionally, approving Worldcom's definition would result in unjust and unreasonable per-call compensation rates for SBRs, thereby violating 47 USC § 201(b), and unjust and unreasonable discrimination against SBRs, thereby violating 47 USC § 202(a). Moreover, while Worldcom provides an "opt out" provision in its definition to permit its SBR customers to compensate PSPs directly, this provision sets an impossible

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RBOC/GTE/SNET Payphone Coalition Petition for Clarification, NSD File No. L-99-34 ("Global Crossing Petition") at pp. ii-iii.

standard that could never be met and, as such, is irrelevant for the purpose of the Commission's review.

The Commission must also deny AT&T's request for clarification. AT&T's request does not accomplish the Commission's goal: to verify and secure compensation for completed calls. AT&T's request and current practices "pass along" to SBRs the per-call charge for non-completed calls, and, thus, is contrary to the Commission's interpretation of 47 USC § 276. Additionally, granting AT&T's request and/or permitting current practices will result in unjust and unreasonable per-call compensation rates for SBRs, thereby violating 47 USC § 201(b), and unjust and unreasonable discrimination against SBRs, thereby violating 47 USC § 202(a).

Additionally, the Commission must reject Global Crossing's request to implement timing surrogates as well as its request to limit SBRs' ability to negotiate private contractual arrangements. Implementing timing surrogates in general would be contrary to the Commission's interpretation of 47 USC § 276, while implementing the timing surrogates proposed by Global Crossing would be arbitrary and capricious under 47 USC §706(2)(B). Additionally, the Commission should not prevent SBRs from negotiating with PSPs, as doing so would preclude SBRs from protecting their rights to secure reasonable compensation terms.

Finally, if the Commission denies the Petitions but does not eliminate, stay, delay, revise or otherwise halt the implementation of its modified rules, it should temporarily suspend the authority of all facilities-based carriers to collect for costs incurred tracking completed calls until the Commission initiates and concludes a proceeding to determine

recoverable costs incurred by facilities-based carriers tracking calls completed by its SBR customers.

Ultimately, the Commission must modify its rules to do as it initially intended: to verify and secure compensation for PSPs for completed coinless calls originating from a payphone. It can do so by clarifying the rules regarding how an SBR assumes responsibility and liability for its own per-completed call payphone compensation. The Commission must strengthen the obligations of facilities-based carriers to inform PSPs of the liable SBR. Then, it must reinforce the SBRs' responsibility to account and remit for its completed calls. For those SBRs that have undertaken the obligation to remit compensation directly to PSPs or through a third-party clearinghouse, the Commission should modify its rules to indemnify the toll-free origination service provider if its SBR customers fail to compensate PSPs. The Commission must indemnify facilities-based carriers from PSPs where an SBR customer has avoided its per-call compensation responsibilities while also making it easier for PSPs to uncover and confront non-paying SBRs. Finally, the Commission should impose limited, but helpful reporting obligations upon facilities-based carriers to help verify an SBRs completed calls. If implemented, these recommendations will resolve the legitimate concerns of all affected parties to this proceeding.

Argument

I. THE COMMISSION SHOULD ELIMINATE STAY, DELAY, REVISE OR OTHERWISE HALT THE IMPLEMENTATION OF ITS TRACKING, REPORTING AND COMPENSATION REQUIREMENTS.

In the *Second Order*, the Commission concluded:

> We modify our rules to adopt a direct-billing arrangement between underlying facilities-based carriers and PSPs. Pursuant to this requirement, the facilities-based carrier must send back to each PSP a statement including the toll-free and access code numbers for calls that the LEC routed to the carrier and the volume of calls each toll-free and access code number that each carrier has received from each of that PSP's payphones.[9]

IDT agrees with those Petitioners that state that adequate notice of the Commission's intention to change reporting requirements was not given, thereby precluding the affected parties from commenting on the flaws of the modified rules.[10] Upon the implementation of the Commission's modified rules, facilities-based carriers, SBRs, PSPs and consumers are likely to suffer irrevocable harm through unrecoverable economic loss. Moreover, the reporting requirements do not accomplish the Commission's goal: to verify and secure compensation for completed coinless calls originating from a payphone. Furthermore, the reporting requirements create unnecessary, burdensome costs to facilities-based carriers and SBRs. In order to prevent these harms, the Commission should eliminate, stay, delay, revise or otherwise halt the implementation of its modified rules.

[9] *Second Order* at ¶18.
[10] *See*, Worldcom Petition at pp. 1-2; *See also*, AT&T Petition at p. 2.

A. Interested Parties Were Not Provided Notice of the Commission's Intention to Change Reporting Requirements.

IDT, like Worldcom and AT&T have a "good reason"[11] for not previously commenting on the Commission's rule modifications: there was no prior discussion in the Public Notice or elsewhere contemplating the rule modifications made in the *Second Order*.[12] Rather, it seems that the Commission based its decision to impose the tracking, reporting and compensation requirements on *ex parte* filings submitted by the American Public Communications Council.[13] Since this did not present an adequate opportunity for interested parties to comment, IDT agrees with Worldcom that "The Commission's requirement to track and compensate on behalf of SBR customers was arrived at without opportunity for parties to comment on how the requirement might affect them,"[14] and with AT&T that the Commission's action in this regard are inconsistent with the notice and comment provisions of 5 U.S.C. § 553(b)&(c).[15]

Sprint Corporation ("Sprint") has also filed comments before the Commission demonstrating how its rule modifications violated the notice and comment provisions of the Administrative Procedure Act ("APA") and why the rules should be stayed.[16] Worldcom, while not requesting a stay, has requested the Commission delay the deadline for the implementation of underlying carrier capabilities until January 1, 2002.[17] IDT

[11] Within the meaning of 47 CFR § 1.106(b).
[12] *See*, AT&T Petition at p. 4.
[13] *See generally*, "Notice of Written *Ex Parte* from Albert H. Kramer to the Federal Communications Commission," In the Matter of The Pay Telephone Reclassification And Compensation Provisions Of The Telecommunications Act of 1996, CC Docket No. 96-128; RBOC/GTE/SNET Payphone Coalition Petition for Clarification, NSD File No. L-99-34 (January 9, 2001).
[14] Worldcom Petition at pp. 1-2.
[15] *See*, AT&T Petition at p. 4, n.5.
[16] "Request of Sprint Corporation for A Stay Of The Second Order On Reconsideration And Revised Final Rules Pending Judicial Review," In the Matter of Implementation of the Payphone Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, CC Docket No. 96-128, File No. NSD-L-99-34 (May 25, 2001)("*Stay Order"*).
[17] Worldcom Petition at p. 7.

agrees that, at a minimum, implementation of the modified rules should be delayed. Furthermore, IDT adopts Sprint's comments and incorporates them by reference. IDT is aware that the Commission denied Sprint's request on the basis that "Sprint has failed to demonstrate that, absent a stay, it will be irreparably harmed."[18] However, the Commission did not address the substance of Sprint's comments regarding the Commission's violation of the APA. Regardless of the Commission's decision in the *Stay Order*, IDT requests that the Commission address the substantive arguments presented in Sprint's comments, as incorporated by IDT. Moreover, while IDT's Initial Comments are not a formal request for stay, we provide the following overview of the harm faced by facilities-based carriers, SBRs, PSPs and consumers in support of our request that the Commission delay, repeal or otherwise halt the implementation of its modified rules and deny any reconsideration or clarification of those rules proposed by Worldcom, AT&T and Global Crossing.

1. Facilities-based Carriers Will Be Irrevocably Harmed By The Implementation Of The Commission's Rules.

Upon the effective date of the Commission's rules, facilities-based carriers will be compelled to remit per-call compensation on behalf of SBRs. Since these carriers are apparently incapable of implementing the tracking systems mandated by the Commission, they will remit for all calls sent to the reseller's switch. However, SBRs, consistent with their obligation to remit compensation solely for calls answered by the called party, may only reimburse facilities-based carriers upon receipt of records demonstrating compensation paid for "completed" calls. In the absence of such records,

[18] *Order*, In the Matter of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, CC Docket No. 96-128, File No. NSD-L-99-34 (July 26, 2001) at ¶3 ("*Stay Order*").

which the carriers claim they cannot provide, the carriers will not be reimbursed by the SBRs and thus suffer unrecoverable economic loss. If the SBRs choose to reimburse facilities-based carriers for those calls the SBR determines were "answered by the called party," facilities-based resellers will still not recover the cost of compensation paid to PSPs for uncompleted calls. Furthermore, facilities-based carriers may not be able to recover payments made on behalf of SBRs by those SBRs who cease to be in business or otherwise are unwilling or unable to compensate carriers for payments made to PSPs. Under all the above scenarios, facilities-based carriers will be irrevocably harmed and suffer otherwise unrecoverable economic loss as a result of the implementation of the Commission's modified rules.

2. SBRs Will Be Irrevocably Harmed By The Implementation Of The Commission's Rules.

There are several reasons why SBRs will suffer irreparable harm through unrecoverable economic loss if the Commission permits its modified rules to go into effect. First, certain facilities-based carriers have stated their intention to charge SBRs for non-"completed"[19] calls beginning October 1, 2001 (before the Commission has had an opportunity to act on the Petitions to revise the definition of a "completed call"). As a result, those SBRs that concede to the facilities-based carriers' demands rather than challenge those demands before the Commission or a court of competent jurisdiction will have to pay greater per-call compensation. Second, SBRs will not be able to immediately recover this increased cost through an increased "payphone surcharge"[20]

[19] *I.e.*, "calls answered by the called party."

[20] An increased payphone surcharges will likely be determined as followed: First, take the average number of calls per calling card originating from a payphone. Second, multiply that number by the percentage of completed calls. Third, take the figure and multiply it by the amount of per-call compensation (approximately $0.26). Fourth, take the number derived and divide it among the number of completed calls originating from a payphone. (Continued next page)

and/or per-minute rate increases to consumers: various advertising and tariff filing obligations prevent SBRs from changing their payphone surcharge and/or per-minute rates immediately. Therefore, SBRs will be forced to maintain their payphone surcharge and per-minute rates on all calling cards currently in the stream of commerce until the necessary tariff revisions and advertising and production changes can be made and new calling cards and advertising materials can be distributed. Since IDT and other SBRs literally have millions of cards in the market, the potential economic loss is immeasurable and irreparable. As a result, SBRs will have to reimburse facilities-based carriers for increased payphone surcharges even though, for an extended period of time, they will not be able to pass along this additional cost through higher payphone surcharges and/or per-minute rates to consumers. Third, because SBRs are unsure of their legal obligations upon the implementation of the rules and the issues presented by the carriers in this proceeding, SBRs must limit their distribution of cards that contain rates which may not reflect future payphone surcharge and/or per-minute rate increases. This loss of presence in the marketplace represents additional irreparable harm through unrecoverable economic loss.

The following example demonstrates the above process. If a calling card averages six calls originating from a payphone and those calls have a completed call percentage of 67%, then it would average two calls per card originating from a payphone that are not answered by the called party. Since the SBR will still have to remit per-call compensation for these calls, the SBR would then take the reimbursement cost of those uncompleted calls ($0.52) and distribute that cost among the four completed calls, adding $0.13 to the payphone surcharge.

This expense is likely to vary greatly depending on the "market focus" of the particular card. For example, a card primarily used for the domestic market, where call completion rates are higher, will likely see a payphone surcharge like the example above. For calling cards marketed to consumers that make calls to Africa, the Middle East, and certain countries in Asia and South and Central America, where completion rates may be only 33% or less, additional payphone surcharges will likely increase $0.26 to $0.39 for each call originating from a payphone and answered by the called party.

Any system that compels SBRs to add such a considerable expense to its calling cards will make SBRs' calling cards less competitive than calling cards offered by facilities-based providers.

3. Consumers Will Be Irrevocably Harmed By The Implementation Of The Commission's Rules.

While SBRs may not be able to implement increased payphone surcharges immediately, ultimately, consumers will pay for the implementation of the Commission's rules and any changes made to those rules that would compel greater per-call compensation. SBRs will increase payphone surcharges and/or per minute rates as soon as possible upon the implementation of the rules (or upon the extra-legal alteration of those rules, as undertaken by Worldcom, Qwest Global Crossing and AT&T) in order to account for the anticipated rate increases from the facilities-based carriers. For the period in which reporting and remittance obligations remains unsettled, users of calling cards and other coinless call services offered by SBRs will pay more to make calls from payphones. Even if the Commission eventually clarifies the issues in this proceeding fully to SBRs' satisfaction ensuring little or no increase in the rates or frequency of per-call compensation, those consumers who paid increased payphone surcharges in the interim will have suffered irreparable harm through unrecovered economic loss.

4. PSPs Will Be Irrevocably Harmed By The Implementation Of The Commission's Rules.

Despite the apparent windfall for PSPs under the modified rules, they too will suffer unrecoverable economic loss as a result of the implementation of the Commission's rules. First, as noted by Worldcom, "the need for each underlying carrier to incorporate data from hundreds of SBRs could possibly delay the payment to PSPs by at least a quarter."[21] Based on the time necessary to implement the tracking and reporting systems estimated by AT&T – 18 months[22] - per-call compensation may delayed far

[21] Worldcom Petition at p. 4.
[22] AT&T Petition at p. 6.

longer. Additionally, the eventual recognition by facilities-based carriers that they are not likely to be compensated by all SBRs for non-completed calls may lead some carriers to decide not to remit per-call compensation to PSPs until the Commission's rules are clearer. For the above reasons, PSPs will suffer further unrecoverable economic loss upon the implementation of the Commission's modified tracking, reporting and compensation rules.

Additionally, any decision that harms the competitive provision of calling cards and other coinless call options jeopardizes the widespread deployment of payphone services and is therefore contrary to 47 USC § 276. The purpose of requiring per-call compensation is not simply to pay PSPs for their service, but rather to ensure that payphones remain available for the public convenience and necessity. As is evident by the use of calling cards and other coinless call options by consumers, many consumers do not find payphone rates reasonable or find using coins from payphones impractical or impossible, as detailed in AT&T's recent petition to discontinue payphone coin service.[23] Arguably, the availability of calling cards and other coinless call options is as critical to the widespread deployment of payphone service as is the ability of PSPs to receive per-call compensation for these services. The Commission has recognized the critical importance of competition in the coinless calling market through the implementation of 47 CFR § 64.704. Therefore, any decision to promote widespread deployment of payphone services must be consistent with the availability of competitively priced calling cards and other coinless call options to be used at payphones.

[23] *See*, "Public Notice," AT&T Application to Discontinue Interstate Sent-Paid Coin Service, NSD File No. 497; DA No. 01-1870 (August 8, 2001).

5. A Delay, Stay, Repeal or Otherwise Halting of the Commission's Modified Rules Will Not Deprive PSPs of Their Rightful Compensation Nor Will It Force SBRs to Remit Compensation That is Not Lawfully Required.

When the Commission denied Sprint's request for a stay, it stated:

> [T]o the extent that a stay would maintain an ineffective system of per-call compensation that deprives PSPs of the compensation that they are lawfully due, a stay would jeopardize, rather than promote, the widespread deployment of payphone services and, thus, undermine the public interest identified by Congress.[24]

As demonstrated by the IDT and the Petitioners in this proceeding, the Commission has not only imposed an ineffective system, it has imposed, perhaps, an impossible system. Therefore, the question is not whether the Commission is maintaining an ineffective system but whether it is imposing an even less effective system. As evidenced by the Petitions for Reconsideration and/or Clarification submitted in this proceeding detailing the difficulty to implement the Commission's tracking and reporting obligations and the compensation obligation that flows thereunder, the latter is surely the case. Furthermore, any change to the compensation mechanism that grants PSPs compensation they are not lawfully due, at the expense of carriers, SBRs and/or consumers, presents an equal threat to intent of Congress to "make available … to all the people of the United States … efficient, nationwide … communications service with adequate facilities at reasonable charges."[25]

[24] *Stay Order* at ¶3.
[25] 47 USC § 151.

B. The Modified Tracking and Reporting Requirements Create Unnecessary and Burdensome Costs to Facilities-based Carriers and to SBRs.

All three Petitioners agree that the reporting requirements create an unwarranted financial burden. In its comments, Global Crossing notes that "the burdens imposed by this reporting requirement are enormous."[26] Worldcom states that "[s]ystem development costs to include incomplete calls and the tracking and storage costs associated with non-compensable calls could easily result in costs twice what would otherwise be incurred, and amount to an unnecessary and unreasonable burden"[27] and that the reporting requirements "could increase costs by as much as 15 fold."[28] AT&T adds that "it would take approximately 18 months and millions of dollars to make the necessary systems changes to fulfill the apparent requirements of the new rules, both of which would be of minimal value – at best - to the overall compensation process."[29]

The Commission must be aware that this burden will ultimately be borne by SBRs[30] and their users, who will ultimately pay for the new employees, system changes and any other expense, real or imagined, the facilities-based carriers incur as a result of this new requirement. Facilities-based carriers have already stated their intention to add $0.01 to $0.02 per call when they have yet to implement a tracking system. It is unimaginable the charge imposed by facilities-based carriers developed a tracking system, however AT&T has stated that "in many (if not all) cases the administrative costs involved are likely to exceed the savings that would result if resellers actually implemented the processes necessary to (i) determine whether payphone calls are

[26] Global Crossing Petition at p. 8.
[27] Worldcom Petition at p. 6.
[28] *Id.*at p. 5.
[29] AT&T Petition at pp. 5-6.

completed and (ii) report such information back to the originating IXC."[31] The ultimate burden for implementing tracking systems will ultimately fall upon SBRs. The burden may be so great as to prevent full recovery of costs through increased rates, thereby making SBRs uncompetitive in the calling card market, ultimately leading to the end of SBRs within the calling card marketplace. Therefore, the Commission must eliminate this threat by eliminating its overly burdensome tracking and reporting requirements.

C. The Commission Must Clarify That A SBR Can "Come Forward" And Identify Itself As The Party Liable For Compensating The PSP.

In the *Second Order*, the Commission wrote:

> [W]e conclude that the carrier responsible for compensating the PSP for such calls is the first facilities-based interexchange carrier to which a completed coinless access code or subscriber 800 payphone call is delivered by the LEC *unless another carrier comes forward and identifies itself to the PSP as the party liable for compensating the PSP*.[32]

Unfortunately, this principle is not presented as clearly in the modified rules. As a result, the facilities-based carriers assume that reporting and per-call compensation are their sole obligation. IDT asserts that the Commission must clarify the SBRs' right to identify itself as the liable party and establish the manner in which SBRs may do so, thereby ensuring there is no disagreement between SBRs, facilities-based carriers and PSPs over the tracking and compensating of completed coinless calls. Upon this clarification, all parties will receive the relief requested for: (1) PSPs will know the responsible party for per-call compensation; (2) facilities-based carriers will avoid building expensive, burdensome systems to track calls sent to SBRs; and (3) SBRs will avoid paying for calls

[30] ("It is not necessary for the Commission to impose these additional costs on underlying carriers, which in turn would be passed along to their reseller customers.") Worldcom Petition at p. 5.
[31] AT&T Petition at p. 3 (Footnote omitted).
[32] *Second Order* at ¶ 9. (Emphasis added)

not answered by the called party as well as for tracking expenses. Where an SBR declines to accept responsibility for remitting its per-call compensation directly to PSPs or through a third-party clearinghouse, a facilities-based carrier will be responsible for per-call compensation, and shall have the right to recover its per-call and tracking costs from its SBR customer.

D. The Tracking, Reporting and Compensation Requirements Do Not Support the Commission's Goal: To Enable PSPs to Verify and Secure Accurate Compensation.

The purpose of the *Second Order* was to "address the difficulty which PSPs face in obtaining compensation for coinless calls placed from payphones which involve a switch-based telecommunications reseller in the call path"[33] and to "enable the PSP to verify the accuracy of compensation it receives…."[34] However, the Commission has required the first interexchange carrier to "send back to the PSP a statement indicating the toll-free and access code numbers for calls that the LEC routed to the carrier and the volume of calls for each toll-free and access code number that each carrier has received from each of that PSP's payphones."[35] IDT joins the facilities-based carriers in opposing the additional tracking and reporting requirements. Similarly, we agree with Global Crossing that "the reports would be of minimal value"[36] The Commission should reconsider its additional tracking and reporting requirements, as they are irrelevant to the remittance of per-completed call compensation, which is the focus of this proceeding.

The Commission should similarly reconsider its compensation obligations, as they do not "verify the accuracy of compensation received" by PSPs, but instead guarantee

[33] *Id.*at ¶1.
[34] *Id.*at ¶11.
[35] *Id.*at ¶18.
[36] Global Crossing Petition at p. 8.

unwarranted compensation to the detriment of facilities-based carriers, SBRs and ultimately, consumers. In addressing the perceived deficiencies of its rules, the Commission should focus on the goal of verifying revenue, rather than forcing facilities-based carriers into the role of collection agents.

Changes to the rules to assist PSPs in securing and verifying per-call compensation can be made easily. First, oblige facilities-based carriers to offer SBRs the right to assume full responsibility and liability for per-completed call tracking, reporting and compensation. However, other than a simple notice provision described in its rules and made by the facilities-based carrier and/or the SBR to the PSP, the Commission should not permit facilities-based carriers to condition SBR acceptance of its per-completed call tracking, reporting and compensation obligations. Second, require IXCs to identify to PSPs the responsible reseller ("Illustrating how carriers avoid payment, APCC claims that *IXCs unilaterally determine that they are not responsible for paying compensation for calls routed to switch-based resellers, but at the same time the IXCs do not identify which resellers are responsible for compensation, even when the PSP requests this information.*")[37] Third, clarify that the SBR is responsible for remitting per-call compensation for all calls sent to its switch and subsequently answered by the called party, removing the concern that "an IXC and a switched-based reseller [may] determine, independently, that neither is responsible for compensation on a call."[38] Fourth, for those SBRs that have accepted the obligation to compensate PSPs directly or through a third-party clearinghouse, modify the Commission's rules to indemnify facilities-based carriers

[37] *Second Order* at ¶8 (Emphasis added).
[38] *Id.*

where its SBR customers fail to compensate PSPs.[39] Fifth, the Commission can make a concerted effort to respond to PSP complaints regarding non-compensating SBRs.[40]

Most importantly, to assure PSPs that SBRs are remitting per-call compensation, the Commission may require facilities-based carriers to report quarterly to a PSP or a third-party clearinghouse the calls sent to the switch of each individual SBR. Obviously, this will only provide a list of calls sent to the switch, not answered by the called party, but it will help verify completed calls, which is the Commission's goal. It will help verify completed calls because the PSP will be able to compare the number of calls sent to an SBRs switch against the number of calls the SBR has remitted per-call compensation for. By having this information available, the PSP can reasonably verify whether the SBR is remitting per-call compensation at a rate consistent with industry completed call averages. Where a SBR is remitting compensation for a percentage lower than industry standards, a "red flag" will be raised for the PSP. At that point, the PSP can contact the respective SBR to address its concerns it may have. If implemented by the Commission, these proposals will provide a clearer understanding of the responsible party and a more efficient process for verifying compensable calls without imposing unreasonable burdens upon facilities-based carriers and SBRs, thereby presenting a fair, reasonable alternative to the modified rules and the requests to reconsider those rules.

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[39] IDT is aware that PSPs are likely to oppose this recommendation in particular, as it eliminates the "deep pocket" from the PSPs grasp. IDT is also aware that PSPs are likely to suffer some loss as a result of non-payment from SBRs. Unfortunately, loss as a result of non-payment is the cost of doing business in any industry. IDT declines to accept the notion that Congress intended for PSPs to receive greater protection against loss than other providers, such as local exchange carriers and interexchange carriers. Similarly, we fail to see how the burden for PSPs' loss should be placed on other providers – most notably, facilities-based providers and SBRs.

[40] It is a common misconception furthered by the PSP community and its lobbyists that SBRs fail to remit per-call compensation or generally encourage a climate of abusing the system. The Commission must be aware that this perception is not reality. Moreover, IDT and all other law-abiding SBRs would like nothing more than to see those few "bad actors" (presuming they exist) exposed and forced out of the market

II. THE COMMISSION MUST DENY WORLDCOM'S REQUEST TO CHANGE THE DEFINITION OF A "COMPLETED CALL."

Worldcom has petitioned the Commission to declare that "a completed dial-around payphone call be defined as "one that is either completed on the underlying carrier's network, or one that is handed off to its SBR customers that do not have prior agreements with all [PSPs] to pay dial around compensation."[41] Such a change would be inconsistent with the Commission's interpretation of 47 USC § 276(b)(1)(A) and would violate 47 USC §§ 202(a) and 201(b). Therefore, Worldcom's request to change the definition of a completed call should be denied.

A. Worldcom's Proposed Change of the Definition of a Completed Is Inconsistent With The Commission's Interpretation of 47 USC § 276.

47 USC § 276(b)(1)(A) mandates that PSPs receive compensation for "each and every completed intrastate and interstate call" made from a payphone. The Commission has defined a completed call as "a call that is answered by the called party."[42] The Commission based this definition on previous findings that "where an 800 calling card call is routed through an IXC's platform, it should not be viewed as two distinct calls – one to the platform and one to the called party." [43] Additionally, the Commission has recognized that "the United States Court of Appeals for the District of Columbia Circuit has emphasized the one-call nature of a subscriber 800 call from the caller's point of

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because these providers, through their failure to meet their regulatory and legal responsibilities place themselves at a competitive advantage over law-abiding SBRs.

[41] Worldcom Petition at p. 4.

[42] *Report and Order* at ¶ 63.

[43] *Id.*, *citing* Teleconnect Co. v. Bell Telephone Company, 10 FCC Rcd 1626, 1629 (1995)("Teleconnect"); *See also*, Long Distance/USA, Inc. v. Bell Telephone Company of Pennsylvania, 10 FCC Rcd 1634 (1995)("Long Distance").

view."[44] Worldcom's definition fails to explain how the "second call" – from the platform to the called party, would be treated for jurisdictional or other purposes. Additionally, Worldcom fails to explain why the Commission should view a subscriber 800 call from the toll origination service provider's point of view, rather than the subscriber's point of view. IDT asserts that, for these reasons alone, Worldcom has failed to provide a persuasive argument or any authority to support its contention that the introduction of new tracking and reporting requirements should have legal significance.[45] Moreover, since "[A]n agency changing its course by rescinding a rule is obligated to supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance,"[46] IDT asserts that Worldcom has not presented any, let alone sufficient, evidence upon which the Commission may rescind or revise its rules compelling compensation for calls answered by the called party. Therefore, since Worldcom's request is unsupported and inconsistent with the interpretation of 47 USC § 276(b)(1)(A), it must be denied.

[44] Florida Public Telecommunications Association v. Federal Communications Commission, 312 U.S. App. D.C. 24; 54 F.3d 857, 860; 1995 U.S. App. LEXIS 12199, *6 (May 23, 1995)(("Florida").
[45] Long Distance at 10 FCC Rcd 1638.
[46] Motor Vehicle Manufacturers Association of the United States v. State Farm Mutual Automobile Insurance Company, 463 U.S. 29, 42 (1983).

B. Worldcom's Request Will Result in Unjust and Unreasonable Discrimination Against SBRs.

Under 47 USC § 202(a):

> It shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communications service, directly or indirectly, by means or device, or to make or give any undue or unreasonable preference or advantage to any particular person, class of persons, or locality, or subject any particular person, class of persons, or locality to any undue or unreasonable prejudice or disadvantage.

There is a well-established, three-pronged test for determining whether a carrier's conduct violates the anti-discrimination provision of 47 USC § 202(a): (1) whether the services at issue are "like"; (2) if the services are "like," whether the carrier treats them differently; and (3) if the carrier treats them differently, whether the difference is reasonable.[47]

When applied to Worldcom's proposed definition of a completed call, the above test establishes that a toll-free origination service provider's treatment of its own per-call compensation and tracking charges discriminates against calling card providers that use switch-based resold service. Under the first part of the test, the services – coinless calls originating from a payphone – are "like," regardless of whether provided by a SBR or facilities-based carrier. In fact, they are identical.

Second, the services are treated differently, because when the service is provided by an SBR, per-call compensation and tracking charges will be imposed upon calls that are not answered by the called party, whereas when the same service is provided by a facilities-based carrier, per-call compensation and tracking fees will be remitted only for

[47] *See*, MCI Telecommunications Corp. v. FCC, 917 F.2d 30, 39 (D.C. Cir. 1990); Allnet Communications Serv., Inc. v. US West, Inc., 8 FCC Rcd. 3017, 3025, p. 38 n. 87 (1993).

calls answered by the called party. This unjust and unreasonable practice imposes different compensation obligations upon calling card providers solely based upon the provider's classification as a facilities-based carrier or a SBR.

Third, this disparate treatment is unreasonable because facilities-based carriers have an obligation to "track, or arrange for tracking of, each such call so that it may accurately compute the compensation required …"[48] for "completed coinless access code or subscriber toll-free payphone call."[49] The Commission did not establish different tracking obligations depending on the type of service provider. Yet neither the Petitioners nor other facilities-based carriers have contacted their SBR customers to "arrange for tracking," even though SBRs are capable of tracking and reporting calls answered by the called party. Instead, the facilities-based carriers have taken the position that that tracking must be done solely through their own facilities and actions. If this is as the Commission intended, since facilities-based carriers are apparently incapable of tracking and reporting calls handed off to a SBR and subsequently answered by the called party, this must be cause to eliminate the tracking and reporting rules in their entirety and not simply serve as an excuse to discriminate against SBRs and in favor of facilities-based carriers for the purpose of determining and remitting per-call compensation. On the other hand, if the Commission intended to permit and/or require SBRs to track and report their completed calls, it is unclear why the Commission would interject the facilities-based carriers into the tracking, reporting and compensation scheme. As noted by Worldcom, subsequent disputes questioning the accuracy of compensation would require the underlying carrier to point the PSP to the downstream SBR, meaning that

[48] 47 USC § 64.1310(a).
[49] 47 USC § 64.1300(a).

"[t]his is no different than the current regime."[50] Regardless, the Commission must address the issue of whether (and if so, how) SBRs may provide completed call tracking information to their facilities-based carriers.

Since facilities-based carriers will be required to remit compensation only for calls answered by the called party, while SBRs will be required to remit compensation for all calls handed off to its switch, including calls not answered by the called party, facilities-based carriers will have significantly lower costs, thereby placing SBRs at a disadvantage in the calling card market. Since call completion rates vary considerably based on several factors, it is difficult to quantify how great this disadvantage will be, however, the following example provides an illustration that the disadvantage is direct and unavoidable. If a SBR and a facilities-based carrier have an identical number of calling card calls originating from a payphone (*e.g.* 1,000,000) and identical call completion rates (*e.g.,* 60%), the facilities-based carrier will remit $14,400.00[51] in per-call compensation. For the same calls and completion rate, under Worldcom's altered definition, a SBR would remit $24,000.00[52] in per-call compensation. Moreover, since the SBR will also be required to remit "tracking" fees for all "completed" calls under Worldcom's definition, the SBR would remit an additional $8,000.00[53] in tracking fees. As a result, SBRs will be required to remit $17,600.00[54] more than facilities-based carriers in the above example. SBRs will have to recover this additional cost through

[50] Worldcom Petition at p. 3.
[51] 600,000 multiplied by $0.24.
[52] 1,000,000 multiplied by $0.24.
[53] This number is determined by: (1) assuming that the facilities based carrier and SBR pay equal compensation for the 60%, or 600,000, calls actually answered by the called party and (2) multiplying the remaining 40%, or 400,000 of the calls to be considered "completed" by the SBR by $0.02, which is the tracking fee Worldcom has stated it shall impose. This figure is $8,000.00. Since facilities based carriers will not have to remit for calls not completed on their network, they will incur no charge, making $8,000.00 the difference in tracking costs for SBRs and facilities based carriers in this example.

increased rates to end users, thereby placing SBRs at a competitive disadvantage against facilities-based providers of coinless calling services.

C. Worldcom's Petition Does Not Provide A Real Option For SBRs To Avoid "All-Call" Compensation.

The Commission should not be fooled by the apparent "opt out" clause for SBR customers that "have prior agreements with all [PSPs] to pay dial around compensation."[55] This is a red herring for several reasons. First, it is impossible for an SBR to get signed agreements with "all" PSPs. Moreover, even if SBRs received agreements from 99.9% of all PSPs, if one PSP failed to assent, the remaining agreements would be invalid.

Second, as detailed throughout our comments, it is known throughout the industry that interexchange carriers such as Worldcom will remit compensation to PSPs for all calls received by a SBRs' switch. Since all PSPs and Worldcom are well aware that the actual percentage of calls "answered by the called party," and, hence compensable, under the current interpretation of 47 USC § 276, range from 15% - 70%[56], PSPs are faced with two "options": (1) accept compensation from the facilities-based carrier for all calls sent to a SBRs' switch or (2) accept compensation from the SBR for all calls answered by the called party, even though this will result in 30% - 85% less compensation than under the first option. It is preposterous to think any PSP would choose the second option. Indeed, this has proven to be the case, as PSPs have declined to enter into direct agreements with SBRs. Since Worldcom's proposed definition is unjust and unreasonable under 47 USC

[54] ($24,000.00 + $8,000.00) - $14,400 = $17,600.00.
[55] Worldcom Petition at p. 1.
[56] This percentage varies by factors including, but not limited to: the country called, the location within the particular country and the time of day called.

§ 202(a) and the so-called "option" to compensate PSPs directly is illusory, the Commission should reject Worldcom's revised definition of a completed call.

D. Worldcom's Request Will Result in Unjust and Unreasonable Rates for SBRs.

47 USC § 201(b) states in part:

> All charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is declared to be unlawful …

The Commission has broad discretion in selecting methods to evaluate the reasonableness of rates.[57] The Commission has considered whether a change in a rate is just and reasonable based on a "substantial cause" test.[58] The first part of the test will "hinge to a great extent on the carrier's explanation of the factors necessitating the desired change at that particular time."[59] In the current proceeding, Worldcom has stated that the change is required to ensure compliance with its tracking and reporting obligations. However, Worldcom's discriminatory distinctions, and the unjust and unreasonable rates that flow from that discrimination do not present a "legitimate business need."[60] Worldcom is apparently incapable of meeting its tracking obligations on its own but has made no effort to "arrange for tracking" with its SBR customers. As a result, Worldcom's explanation that it is incapable of meeting its obligations is incorrect.

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[57] *See*, *e.g.*, Southwestern Bell v. FCC, 168 F.3d at 1344, 1352 (D.C. Cir. 1999); MCI Telecommunications Corp. v. FCC, 675 F.2d 408, 413 (D.C. Cir. 1982); Aeronautical Radio, Inc. v. FCC, 642 F2d 1221, 1228 (D.C. Cir. 1980), *cert. denied*, 451 U.S. 920 (1981).

[58] *See, Order on Reconsideration*, In the Matter of Policy and Rules Concerning the Interstate, Interexchange Marketplace, 12 FCC Rcd 15014, 15023-24 (1997); *Memorandum Opinion and Order on Reconsideration*, Competition in the Interstate Interexchange Marketplace, 10 FCC Rcd 4562, 4574 and n. 51 (1995).

[59] *Memorandum Opinion and Order*, In the Matter of RCA American Communications, Inc.; Revisions to Tariff F.C.C. Nos. 1 and 2, FCC 81-255; CC Docket No. 80-766; Transmittal Nos. 191 and 273 (May 21, 1981)("RCA") at ¶13.

[60] *Memorandum Opinion and Order*, In the Matter of INFONXX, Inc. v. New York Telephone Co., FCC 97-359; File No. E-96-26 (October 6, 1997)("INFONXXX") at ¶ 16.

Rather, Worldcom has declined to make a good faith effort to meet its obligations, choosing instead to propose (and implement without authorization) policies that harm its competitors in the coinless calling market.

Next, the Commission will "take into account the position of the relying customer in evaluating the reasonableness of the change."[61] The position of Worldcom's SBR customers, such as IDT, is that the change is unreasonable because it results in per-call compensation and tracking fees for SBRs for calls not answered by the called party while the same charges are not applied to facilities-based carriers. As demonstrated in the above subsection, this discriminatory treatment results in greater compensation obligations for SBRs, thereby creating an advantage for facilities-based carriers such as Worldcom in the calling card market. For these reasons, approval of Worldcom's changed definition of a completed call will result in unjust and unreasonable rates under 47 USC § 201(b).

[61] *Id.* at ¶ 12.

III. THE COMMISSION MUST DENY AT&T's REQUEST FOR CLARIFICATION.

In its Petition, AT&T requests clarification that its practice of "pay[ing] payphone compensation to PSPs at the Commission-established rate for all calls that complete to a switch-based reseller's switching platform, whether or not such calls are completed to the called party"[62] is "consistent with the Commission's new requirements and that if AT&T continues this practice it need not take additional steps to track calls routed to resellers."[63] For the following reasons, the Commission should reject AT&T's request. First, the request does not accomplish the Commission's goal: to verify and secure compensation for completed calls. Second, if permitted, AT&T's practice will "pass along" to SBRs the per-call charge and tracking fees for non-completed calls, and, therefore, be inconsistent with 47 USC § 276 and 47 CFR § 64.1310(b). Third, this "pass along" would be a violation of 47 USC § 202(a), as it would unjustly and unreasonably discriminate between calling card providers that use switch-based resold service, who would be required to remit per-call compensation for non-completed calls, and calling card providers that use their own facilities, who would be permitted to demonstrate calls answered by the called party and thereby avoid remitting compensation for non-completed calls. Fourth, this "pass along" would be a violation of 47 USC § 201(b), as charging SBRs $0.24 plus tracking charges for non-completed calls is unjust and unreasonable.

[62] AT&T Petition at pp. 2-3 (Footnote omitted).
[63] *Id.*at p. 3.

A. AT&T's Request Does Not Accomplish the Commission's Goal: To Verify and Secure Compensation for Completed Calls.

In the *Second Order*, the Commission required carriers such as AT&T to "track or arrange for tracking of the call to determine whether it is completed and therefore compensable."[64] The basis for this tracking requirement were the claims by PSPs that they had not received full compensation for completed coinless calls originating from their payphones.[65] Rather than "arrange for tracking" with its SBR customers to track calls sent to an SBRs' switch and subsequently answered by the called party, AT&T has failed to contact SBRs to arrange for tracking of completed calls in favor of simply charging SBRs per-call compensation for all calls sent to a SBR's switching platform. This has resulted in a policy that, as AT&T notes, is "clearly favorable to PSPs."[66] What AT&T fails to note is that this practice is clearly unfavorable to SBRs, as it permits AT&T to collect per-call compensation and tracking fees from SBRs for calls not answered by the called party. Because AT&T's request ignores its obligation to track or arrange for the tracking of completed calls and remit compensation for completed calls, the request must be denied as it fails to meet the goal set forth by the Commission in the *Second Order*.

In the event the Commission grants AT&T's request and permits AT&T and similarly situated carriers to avoid their tracking obligations, the Commission must clarify that these carriers may not "pass along" the cost of non-completed calls to SBRs. Commission action on this issue is essential because AT&T is already charging SBRs for

[64] *Second Order* at ¶2.
[65] *Id.* at n. 22.
[66] AT&T Petition at 3. It should not go unnoticed by the Commission that AT&T, in addition to being a carrier and a calling card provider, is also a PSP, and therefore, will benefit, as a PSP, from its stated policy.

noncompleted calls.[67] SBRs must be permitted to demonstrate those calls actually answered by the called party and reimburse AT&T accordingly. Such an outcome is only fair, as it protects SBRs from being forced to remit compensation for calls not answered by the called party. Similarly, the Commission must clarify that where a facilities-based carrier remits on behalf of a SBR, that carrier may not seek compensation from the SBR at a higher per-call rate or completion percentage than that which it remits to the PSP. Any remittances by the SBR to the facilities-based carrier, with the exception of the tracking charge, must be, in every sense, a "pass through," preventing facilities-based providers from profiting from their tracking, reporting and/or compensation obligations.

B. AT&T's Request and Current Practices "Pass Along" to SBRs The Per-Call Charge For Non-completed Calls, Thereby Violating 47 USC § 276.

47 USC § 276(b)(1)(A) mandates that PSPs receive compensation for "each and every completed intrastate and interstate call" made from a payphone. The Commission has defined a completed call as "a call that is answered by the called party."[68] The Commission based this definition on previous findings that "where an 800 calling card call is routed through an IXC's platform, it should not be viewed as two distinct calls – one to the platform and one to the called party." [69] Additionally, the Commission has recognized that "the United States Court of Appeals for the District of Columbia Circuit has emphasized the one-call nature of a subscriber 800 call from the caller's point of view."[70]

[67] ("AT&T arranges separately for reimbursement with the reseller.") AT&T Petition at n. 3.
[68] *Report and Order* at ¶ 63.
[69] *Id.*, *citing* Teleconnect at 10 FCC Rcd 1626, 1629; *See also*, Long Distance at 10 FCC Rcd 1634.
[70] Florida at 54 F.3d 857, 860; 1995 U.S. App. LEXIS 12199, *6.

AT&T does not challenge the Commission's interpretation of a "completed call." Instead, it seeks affirmation that its compensation regime, which is utterly and completely in opposition to the Commission's interpretation, is actually consistent with the Commission's rules. As such, AT&T utterly fails to explain how the "second call" – from the platform to the called party, would be treated for jurisdictional or other purposes. Additionally, AT&T fails to explain why the Commission should view a subscriber 800 call from the toll origination service provider's point of view, rather than the subscriber's point of view. IDT asserts that, for these reasons alone, AT&T fails to provide a persuasive argument or any authority to support its contention that the introduction of new tracking and reporting requirements should have legal significance.[71] Moreover, since "[A]n agency changing its course by rescinding a rule is obligated to supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance,"[72] IDT asserts that AT&T has not presented any, let alone sufficient, evidence upon which the Commission may rescind or revise its rules compelling compensation for calls answered by the called party. Therefore, since AT&T's request is unsupported and inconsistent with the interpretation of 47 USC § 276(b)(1)(A), it must be denied.

The basis for AT&T's request seems to be that "the administrative costs involved [in developing a tracking system] are likely to exceed the savings that would result if resellers actually implemented the processes necessary to (i) determine whether payphone calls are completed and (ii) report such information back to the originating IXC."[73] IDT

[71] Long Distance at 10 FCC Rcd 1638.
[72] Motor Vehicle Manufacturers Association of the United States v. State Farm Mutual Automobile Insurance Company, 463 U.S. 29, 42 (1983).
[73] AT&T Petition at n.4 (Footnote omitted).

is not in a position to judge the costs that may or may not be incurred by facilities-based carriers to implement on their own the tracking systems required by the Commission. However, since SBRs such as IDT have long-provided completed call information to PSPs or to third party clearinghouses, we believe the carriers have an obligation to "arrange for tracking"[74] with their SBR customers to avoid the allegedly massive cost and difficulty of implementing new tracking and reporting systems.

IDT requests that the Commission address this important issue and, at a minimum, permit SBRs to track their own calls and report such information to their facilities-based carriers. This will permit facilities-based carriers to avoid creating new systems that may not even be capable of accomplishing the Commission's requirements. IDT is perplexed that its facilities-based carriers have declined to contact us (and, to the best of our knowledge, any SBRs) about such an obvious option. We decline to speculate on the reasons for such action, but the fact that the proposals set forth by the carriers will place the Petitioners at a competitive advantage over their SBR competitors in the calling card market and will provide additional sources of revenue in the toll-free origination service provider market and the PSP market (which all the Petitioners are members of) strongly suggests that the carriers have chosen to use the Commission's *Second Order* as a means to profit and gain a competitive advantage.

If the Commission grants AT&T's request, SBRs could be further harmed through the potential imposition of tracking fees for non-completed calls, which are otherwise prevented by the *Second Order*. Specifically, the *Second Order* states, "facilities-based carriers may recover from their reseller customers the expense of payphone per-call compensation and the cost of tracking compensable calls by negotiating reimbursement

[74] 47 USC § 64.1310(a).

terms in future contract provisions."[75] Since calls answered by the called party are non-compensable, the cost of tracking non-completed calls may not be "passed through" to SBRs. Under AT&T's request, however, calls not answered by the called party *are* compensable, thereby permitting AT&T and other similarly situated carriers to charge an additional "tracking fee" for non-completed calls. In order to prevent this further inequity, the Commission must reject AT&T's request for clarification.

C. AT&T's Current Practice and Request for Clarification Is Unjust and Unreasonable Discrimination Against SBRs.

As IDT previously set forth, under 47 USC § 202(a):

> It shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communications service, directly or indirectly, by means or device, or to make or give any undue or unreasonable preference or advantage to any particular person, class of persons, or locality, or subject any particular person, class of persons, or locality to any undue or unreasonable prejudice or disadvantage.

There is a well-established, three-pronged test for determining whether a carrier's conduct violates the anti-discrimination provision of 47 USC § 202(a): (1) whether the services at issue are "like"; (2) if the services are "like," whether the carrier treats them differently; and (3) if the carrier treats them differently, whether the difference is reasonable.[76]

When applied to AT&T's current practice of determining compensable calls and its Request for Clarification, the above test establishes that a toll-free origination service provider's treatment of per-call compensation and tracking charges for its own coinless calling services discriminates against calling card providers that use switch-based resold

[75] *Second Order* at ¶ 18.

service. Under the first part of the test, the services provided – coinless calls originating from a payphone – are "like," regardless of whether provided by SBRs or facilities-based carriers. In fact, they are identical.

Second, the services are treated differently, because when the service is provided by an SBR, per-call compensation and tracking charges are imposed upon calls that are not answered by the called party, whereas when the same service is provided by AT&T, per-call compensation and tracking fees are remitted only for calls answered by the called party. This unjust and unreasonable practice imposes different compensation obligations upon calling card providers based on the provider's classification as a facilities-based carrier or SBR.

Third, this disparate treatment is unreasonable because facilities-based carriers have an obligation to "track, or arrange for tracking of, each such call so that it may accurately compute the compensation required …"[77] for "completed coinless access code or subscriber toll-free payphone call."[78] Yet AT&T has not contacted its SBR customers to "arrange for tracking," even though SBRs are capable of tracking and reporting calls answered by the called party. Instead, AT&T has taken the position that that tracking must be done solely through its own facilities and actions. If this is as the Commission intended, since AT&T is incapable of tracking and reporting calls handed off to a SBR and subsequently answered by the called party, this must be cause to eliminate the tracking and reporting rules in their entirety and not simply serve as an excuse to discriminate against SBRs and in favor of AT&T for the purpose of determining and

[76] *See*, MCI Telecommunications Corp. v. FCC, 917 F.2d 30, 39 (D.C. Cir. 1990); Allnet Communications Serv., Inc. v. US West, Inc., 8 FCC Rcd. 3017, 3025, p. 38 n. 87 (1993).
[77] 47 USC § 64.1310(a).
[78] 47 USC § 64.1300(a).

remitting per-call compensation. On the other hand, if the Commission intended to permit and/or require SBRs to track and report their completed calls in order to assist the facilities-based carrier in its obligations, it is unclear why the Commission would interject the facilities-based carriers into the tracking, reporting and compensation scheme. As noted by Worldcom, subsequent disputes questioning the accuracy of compensation would require the underlying carrier to point the PSP to the downstream SBR, meaning that "[t]his is no different than the current regime."[79] Regardless, the Commission must address the issue of whether (and if so, how) SBRs may provide completed call tracking information to their facilities-based carriers.

D. AT&T's Current Practice and Request Results in Unjust and Unreasonable Rates for SBRs.

47 USC § 201(b) states in part:

> All charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is declared to be unlawful …

The Commission has broad discretion in selecting methods to evaluate the reasonableness of rates.[80] The Commission has considered whether a change in a rate is just and reasonable based on a "substantial cause" test.[81] The first part of the test will "hinge to a great extent on the carrier's explanation of the factors necessitating the desired change at

[79] Worldcom Petition at p. 3.
[80] *See*, *e.g.*, Southwestern Bell v. FCC, 168 F.3d at 1344, 1352 (D.C. Cir. 1999); MCI Telecommunications Corp. v. FCC, 675 F.2d 408, 413 (D.C. Cir. 1982); Aeronautical Radio, Inc. v. FCC, 642 F2d 1221, 1228 (D.C. Cir. 1980), *cert. denied*, 451 U.S. 920 (1981).
[81] *See, Order on Reconsideration*, In the Matter of Policy and Rules Concerning the Interstate, Interexchange Marketplace, 12 FCC Rcd 15014, 15023-24 (1997); *Memorandum Opinion and Order on Reconsideration*, Competition in the Interstate Interexchange Marketplace, 10 FCC Rcd 4562, 4574 and n. 51 (1995).

that particular time."[82] In the current proceeding, AT&T has stated that the clarification of its practices is necessary so that the company may avoid compliance with its tracking obligations. AT&T's discriminatory distinctions, and the unjust and unreasonable rates that flow from that discrimination do not present a "legitimate business need."[83] AT&T fails to inform the Commission that it has declined to contact its SBR customers to determine if they may "arrange for tracking" of their calls answered by the called party, thereby providing the information necessary to meet the tracking obligations. As a result, AT&T's explanation that it is incapable of tracking or that implementing a tracking system would be prohibitively costly is incorrect. Rather, AT&T has simply failed to fully consider its tracking options.

Next, the Commission will "take into account the position of the relying customer in evaluating the reasonableness of the change.[84] The position of AT&T's SBR customers, such as IDT, is that the change is unreasonable because it may result in per-call compensation and tracking charges to SBRs for calls not answered by the called party while the same charges are not applied to facilities-based carriers providing a like service. As demonstrated in the above subsection, this discriminatory treatment results in greater compensation obligations for SBRs, thereby creating an advantage for facilities-based carriers such as AT&T in the calling card market.

Furthermore, we recommend the Commission investigate AT&T's past practices regarding the collection of per-call compensation from SBRs. Based on the company's admissions that that it "calculate[d] its payphone compensation payments on the

[82] *Memorandum Opinion and Order*, In the Matter of RCA American Communications, Inc.; Revisions to Tariff F.C.C. Nos. 1 and 2, FCC 81-255; CC Docket No. 80-766; Transmittal Nos. 191 and 273 (May 21, 1981) at ¶13.

(knowingly incorrect) assumption that all calls that complete to the reseller's platform are completed to the called party and thus compensable,"[85] it seems likely that AT&T "passed along" these charges to their SBR customers. If this is the case, the Commission should find such intentional, egregious and repeated contact represents unjust and unreasonable business practices within the meaning of 47 USC § 201(b) and take appropriate action.

[83] *Memorandum Opinion and Order*, In the Matter of INFONXX, Inc. v. New York Telephone Co., FCC 97-359; File No. E-96-26 (October 6, 1997) at ¶ 16.
[84] *Id.* at ¶ 12.
[85] AT&T Petition at p. 3.

IV. THE COMMISSION MUST DENY GLOBAL CROSSING'S PETITION

The Commission must reject Global Crossing's request to implement timing surrogates to determine whether a call is completed and, hence, compensable, as timing surrogates have already been rejected by the Commission as inconsistent with 47 USC § 276.[86] If the Commission grants Global Crossing's request, its decision would be arbitrary and capricious under 5 USC § 706(2)(B), as Global Crossing has not presented any evidence upon which the Commission can articulate a rational connection between the facts needed to support its request.[87] Finally, the Commission should not limit SBRs' ability to negotiate private contractual arrangements for which they have the ultimate compensation obligation.

A. The Commission Must Reject Global Crossing's Request to Implement Timing Surrogates to Determine Whether a Call is Completed and Compensable, as Timing Surrogates Have Already Been Rejected By The Commission As Inconsistent With 47 USC § 276.

In its Petition, Global Crossing requests that the Commission adopt its proposal that "[c]alls would be considered completed if the carrier time field at the originating switch is over 25 seconds, except for 950- calls that would not be considered completed until 45 seconds have elapsed."[88] In setting forth its argument in favor of its position, Global Crossing provides a detailed examination of the flaws of the Commission's decision to impose the obligation to track and remit compensation on the first interexchange carrier:

> The first IXC only knows that the second IXC has received the call, typically at a calling card or debit card platform. At that point, it loses

[86] *Report and Order* at ¶ 63.
[87] Achernar at 314 U.S. App. D.C. 109, 112; 62 F.3d 1441, 1445; 1995 U.S. App. LEXIS 22656 at *9; (August 18, 1995).
[88] Global Crossing Petition at pp. 7-8 (footnote omitted).

> visibility to call and therefore cannot tell if the call has been completed to its ultimate destination.[89] *** Global Crossing doubts that such [call identification] systems could be implemented and they certainly could not be implemented in the seven-month implementation period established by the Commission.[90] *** [Global Crossing] … believes those costs [for such systems] to be in the tens, if not hundreds of millions of dollars.[91]

However, Global Crossing fails to provide a similarly astute argument in favor of timing surrogates. This failure, compounded by the Commission's previously stated policy against timing surrogates, compel the Commission to reject Global Crossing's recommendation for timing surrogates.

In its *Report and Order*, the Commission correctly rejected timing surrogates, finding that, "exempting calls from per-call compensation because they are not of a requisite duration, whether 25 seconds … or 60 seconds … would not be in accordance with Section 276's mandate that 'each and every completed intrastate and interstate call' be compensated."[92] Global Crossing fails to address the arguments set forth in the *Report and Order,* instead choosing to rely upon the argument that it cannot meet its tracking and reporting obligations. However, since Global Crossing, like Worldcom and AT&T has not contacted IDT nor, to the best of our knowledge, any SBR to "arrange for tracking," this argument is specious. To the degree that facilities-based carriers cannot track calls answered by the called party, the Commission must make revisions to its rules – not exceptions. Furthermore, while it may not be Global Crossing's intention, the obvious result of granting Global Crossing's request would be the failure of PSPs to receive compensation for all calling or debit card calls answered by the called party but

[89] *Id.* at p. 4 (footnote omitted).
[90] *Id.* at p. 6 (footnote omitted).
[91] *Id.* at pp. 6 – 7 (footnoted omitted)
[92] *Report and Order* at ¶63.

lasting 25 seconds or less. Such a result is inconsistent with Section 276's mandate and therefore must be rejected.

Global Crossing's request is not only inconsistent with Section 276 and contrary to PSPs right to compensation for all completed calls, it is contrary to calling card providers right *not* to remit compensation for non-completed calls. As Global Crossing concedes, "Calls may, in fact, be connected for substantial periods of time and still not be completed to the intended recipient. A caller may input his or her calling card number incorrectly or may inquire at a debit card platform as to how much credit is left on the consumer's debit card."[93] Also, "[The process of answer supervision] takes time even if the call is ultimately not completed to the intended recipient. Under the Commission's definition of a completed call, such a call would not be completed and, hence, would not be eligible for compensation."[94] If the Commission were to implement a timing surrogate, then, calling card providers would be required to remit compensation for calls that are not completed ("a call that is answered by the called party")[95] thereby making the implementation inconsistent with the Commission's previous interpretation of Section 276.

B. <u>If the Commission Were to Reject the Above-mentioned Arguments Provided by IDT and Grant Global Crossing's Request For Timing Surrogates, Such a Decision Would Be Arbitrary and Capricious.</u>

Under 5 USC § 706(2)(B), a reviewing court shall hold unlawful and set aside agency action, findings, and conclusions found to be arbitrary and capricious. Global Crossing has not presented any evidence upon which the Commission can articulate a

[93] Global Crossing Petition at 4, n. 6.
[94] *Id.* at pp.4-5.
[95] *Report and Order* at ¶ 63.

rational connection between the facts needed to support its request.[96] For example, Global Crossing recommends timing surrogates without providing to the Commission any support whatsoever that the surrogates reasonably correspond to the actual time in which calling card calls are completed.[97] In fact, internal studies conducted by IDT reveal that in many cases, 25 seconds is insufficient to determine whether a calling card call has been completed, particularly where the called party is located outside the United States. As a result, granting Global Crossing's calling card timing surrogate would require IDT and similarly situated SBRs to remit compensation for a countless number and percentage of calls that remain active for more than 25 seconds upon reaching the switch, but are never answered by the called party. This is contrary to Section 276 of the Act and contrary to sound telecommunications policy. The truth of the matter – as the Commission and all carriers are well aware – is that developing a timing surrogate is subject to so many variables - the country called, the time of day called, etc. - that any timing surrogate derived at without accounting for such variables would be subject to challenge as arbitrary and capricious. Global Crossing's request is no exception and should be rejected as arbitrary, capricious under 5 USC § 706(2)(B), and contrary to Section 276 of the Act.

C. The Commission Should Not Limit SBRs' Ability to Negotiate Private Contractual Arrangements for Which They Have the Ultimate Compensation Obligation.

Global Crossing has requested that SBRs be denied any role in negotiating the terms under which compensation is reimbursed for their coinless, completed calls. This

[96] Achernar at 314 U.S. App. D.C. 109, 112; 62 F.3d 1441, 1445; 1995 U.S. App. LEXIS 22656 at *9; (August 18, 1995).
[97] IDT rejects the notion that any particular timing surrogate would be consistent with Section 276 and simply sets forth this argument to further reveal the recommendation's unreasonableness.

request is based on the misunderstanding that "The reseller does not have the payment obligation."[98] This statement, however is contrary to the *Second Order* which states, "we conclude that the carrier responsible for compensating the PSP for such calls is the first facilities-based interexchange carrier to which a completed coinless access code or subscriber 800 payphone call is delivered by the LEC *unless another carrier comes forward and identifies itself to the PSP as the party liable for compensating the PSP*."[99] Therefore, the Commission should clarify that where an SBR identifies itself to a PSP as the party liable for its calls, the facilities-based carrier has no obligations to remit on behalf of the SBR, nor should it be permitted to do so.

Global Crossing also requests that SBRs be denied the opportunity to enter private contractual arrangements with PSPs regarding the payment ultimately made by the SBR, citing "great mischief,"[100] and noting that such arrangements "would place the facilities-based carrier in the position of policing the arrangements between PSPs and resellers."[101] It is ironic that Global Crossing would cite "great mischief" as a concern when it, along with AT&T, Qwest, and Worldcom have engaged in considerable mischief of their own, charging SBRs for non-completed calls and adding surcharges when no tracking services have been provided. Additionally, it is facilities-based carriers, not SBRs that have caused the alleged difficulty for PSPs to secure compensation in the first place: ("Illustrating how carriers avoid payment, APCC claims that *IXCs unilaterally determine that they are not responsible for paying compensation for calls routed to switch-based resellers, but at the same time the IXCs do not identify which resellers are responsible for*

[98] Global Crossing Petition at 10.
[99] *Second Order* at ¶9 (emphasis added).
[100] Global Crossing Petition at 10.
[101] *Id.*

compensation, even when the PSP requests this information.")[102] IDT is exceedingly concerned by the Commission's decision to make facilities-based carriers the PSPs collection agency and to require SBRs to foot the bill, as the carriers are neither capable nor impartial enough to implement their tracking, reporting and compensation obligations.

This concern is so great because there is nothing in the Commission's rules to prevent the facilities-based carriers from taking gross advantage of their new position. For example, facilities-based carriers could agree to remit to PSPs $0.50 per call sent to a SBR. Under the Commission's rules, there is nothing to prevent this. Moreover, since the carriers that dominate the toll-free origination service market[103] have effectively colluded to ensure nearly identical positions, SBR customers cannot find an alternative service provider with more reasonable rates and terms. As a result, SBRs would have no alternative but to pay the increased, anti-competitive per-call compensation rates established by facilities-based carriers and PSPs.

Formally prohibiting SBRs from entering agreements with PSPs may be irrelevant since PSPs have no intention of doing so anyway. As noted *supra*, the compensation regime proposed by facilities-based carriers is so beneficial to PSPs as to present no incentive for PSPs to negotiate with SBRs. In order to avoid an elimination of autonomy for SBRs, SBRs desperately need the Commission to prevent facilities-based carriers

[102] *Second Order* at ¶8 (Italics added).
[103] A 1997 Report by Frost and Sullivan, provided as an attachment to "*Ex Parte* Letter from Larry Fenster to Magalie Roman Salas," Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, RBOC/GTE Interim Compensation Proposal, CC Docket No. 96-128 (September 27, 2001) reveals that, as of 1996, AT&T, Worldcom (then MCI Communications and WorldCom) and Frontier (now part of Global Crossing) held 84.1% of the Domestic Interexchange Carrier Toll-Free Services Market by revenue.

from dictating the rates and terms of per-call compensation for SBRs and restore the direct relationship between SBRs and PSPs.

V. THE COMMISSION SHOULD TEMPORARILY SUSPEND THE AUTHORITY OF FACILITIES-BASED CARRIERS TO COLLECT FOR COSTS INCURRED TRACKING COMPLETED CALLS.

47 CFR § 64.1310(b) states that "The first facilities-based interexchange carrier to which a compensable coinless payphone call is delivered by the local exchange carrier may obtain reimbursement from its reseller and debit card customers for … the cost of tracking compensable calls." IDT requests that if the Commission does not rescind or otherwise revise its rules regarding SBRs' compensating facilities-based carriers for tracking, it temporarily suspend the authority of facilities-based carriers to collect for the cost of tracking compensable calls until it concludes a proceeding to determine the costs incurred for such tracking. This is necessary to protect SBRs from facilities-based carriers that would use tracking charges as a source of profit. In such a proceeding, the Commission would be compelled to limit the scope of costs recoverable from SBRs.

A. The Commission Should Undertake a Proceeding to Determine Appropriate Costs for Tracking Completed Calls.

A proceeding is necessary as a result of the confusion caused by the imposition of the tracking requirement. Worldcom and Qwest have announced per-call surcharges of $0.02 per "completed" call, while Global Crossing has announced a $0.01 per-call surcharge.[104] For similarly situated carriers providing identical services to charge rates varying by 100% raises the serious concern that the certain carriers are using the tracking and reporting obligation as an excuse to profit from SBRs,[105] who are not only their toll-free origination service customers, but also their competitors in the calling card market. By initiating a proceeding to determine the costs associated with tracking calls, the

[104] While the words used by the carriers to describe a completed call vary slightly, basically, all three treat a call sent to the SBRs' switch as "completed" and thus compensable.

Commission can determine which services – and the cost of those services – should be included in a carrier's tracking charge. This charge could be based on the cost of service on a carrier-by-carrier basis or through a maximum rate for all carriers that cannot be exceeded absent a cost of service showing. This will protect SBRs from those carriers that might otherwise choose to profit from their tracking and reporting obligation. At the conclusion of the proceeding, facilities-based carriers would be permitted to bill at the rate established in the proceeding for all costs incurred from the first day tracking was implemented by the individual facilities-based carriers, thereby ensuring facilities-based carriers of no loss in revenue as a result of any delay caused by the proceeding.

B. The Scope of Costs Incurred and Recovered Through Tracking Costs Must Be Limited.

47 CFR § 64.1310(b) states that "[t]he first facilities-based interexchange carrier … may obtain reimbursement from its reseller and debit card customers … for the cost of tracking compensable calls." In spite of this mandate, Worldcom states, "these [per call] surcharges would have to cover not only the higher costs of tracking, but include compensation for additional risk underlying carriers would bear for possible data security breaches, and uncertainties associated with the reliability of SBR completed data."[106] IDT requests that the Commission clarify that that recovery for "additional risk for data security breaches" and "uncertainties associated with the reliability of SBR completed data" is outside the scope of recoverable costs. SBRs are not, and cannot be responsible for any costs that are not directly incurred tracking completed calls. Similarly, SBRs cannot be responsible for costs incurred by facilities-based carriers tracking non-

[105] None of the three carriers have explained the tracking services to be provided nor the costs associated with each particular service.
[106] Worldcom Petition at p. 4.

compensable calls. While this is certainly clear in the language of 47 CFR Sec. 64.1310(b), it is contrary to the stated policies of several facilities-based carriers[107] who, in violation of the aforementioned regulation, have stated their intention to impose additional charges for non-completed calls.

C. If Facilities-based Carriers Cannot Demonstrate the Implementation and Use of Tracking Systems to Determine Completed Calls, They Should Not Be Permitted to Charge Tracking Fees.

While, again, it might appear obvious that carriers should not be permitted to charge for a service not provided, certain carriers, including Worldcom, Qwest and Global Crossing have stated their intention to charge, in addition to the $0.24 per-call charge, an additional $0.01 to $0.02 per call[108] even though the carriers have failed to meet their tracking obligations and therefore, are incapable of "accurately comput[ing] the compensation required by 47 CFR Section 64.1300(a)."[109] The Commission must make it clear to these carriers that their right to receive compensation for tracking calls is not invoked until they have demonstrated that they are actually tracking calls in accordance with the *Second Order* and the rules promulgated thereunder.

[107] In correspondence with IDT, Global Crossing and Qwest have stated their intention to not only charge $0.24 per-call compensation for non-completed calls, but to charge an additional $0.01 and $0.02 (respectively) per non-completed call as well. Worldcom has similarly stated its intention to charge $0.26 per non-completed call in correspondence with members of the SBR community. AT&T has notified IDT that it will apply a surcharge as well, but it did not state what the surcharge would be.
[108] Not per "compensable call," in accordance with 47 CFR §64.1310(b).
[109] 47 USC § 64.1310(a).

CONCLUSION

For the reasons stated herein, IDT urges the Commission to deny the Petitions filed by AT&T, Worldcom and Global Crossing in this proceeding and eliminate, stay, delay, revise or otherwise halt the implementation of its tracking, reporting and compensation modified rules.

Sincerely,

_____/s/_____
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October 9, 2001

Statement of Verification

I have read the foregoing and, to the best of my knowledge, information and belief, there is good ground to support it, and is not interposed for delay. I verify under penalty of perjury that the foregoing is true and correct.

Executed on October 9, 2001

_____/s/_____
Carl Wolf Billek

Certificate of Service

I, Carl Wolf Billek, to hereby certify that on this day I caused copies of the foregoing Initial Comments of IDT Corporation to be served upon the parties listed below by Overnight Delivery.

Dated: October 9, 2001

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